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Federal Bureau of Investigation

CALEA Implementation Section
14800 Conference Center Drive, Suite 300
Chantilly, VA 20151

February 11, 1998

By Hand Delivery

Ms. Magalie R. Salas, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *In the Matter of Communications Assistance for Law Enforcement Act*,
CC Docket No. 97-213 (released October 10, 1997)

Dear Ms. Salas:

Enclosed for filing in the above-referenced proceeding is the original of the Federal Bureau of Investigation's Reply Comments *In the Matter of Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213 (rel. October 10, 1997), and an accompanying Certificate of Service.

An additional copy of this request is enclosed to be stamped "received" and returned.

Thank you very much for your attention to this matter.

Sincerely,

Rozanne R. Worrell
Supervisory Special Agent
Federal Bureau of Investigation

Enclosure

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**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of:)

Communications Assistance for Law)
Enforcement Act)
_____)

CC Docket No. 97-213

To: The Commission

**REPLY COMMENTS OF
THE FEDERAL BUREAU OF INVESTIGATION
REGARDING IMPLEMENTATION OF THE
COMMUNICATIONS ASSISTANCE FOR LAW ENFORCEMENT ACT**

Dated: February 11, 1998

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SUMMARY*

The Federal Bureau of Investigation is submitting its reply comments *In the Matter of Communications Assistance for Law Enforcement Act* on its own behalf and on behalf of all other Federal, state, and local law enforcement agencies. Law Enforcement officers, as the experts in and end-user recipients of electronic surveillance technology, have a vested interest in this proceeding. Law Enforcement is pleased to continue its participation in the Commission's effort.

Law Enforcement believes that the Commission's undertaking of a rulemaking action regarding a CALEA standard in this Notice of Proposed Rulemaking would be unwarranted. It would not be legally supportable under CALEA. According to section 107(b), a petition must be filed by a government agency or a person, which claims that the standard, as promulgated (at present Interim Standard J-STD-025), is deficient. Absent the requisite statutory predicate of a deficiency petition being filed regarding J-STD-025, the Commission lacks the statutory authority to engage in such rulemaking. Further, CALEA does not authorize the Commission to entertain TIA's request to render advisory opinions in this NPRM regarding carrier and manufacturer liability during the period that the interim standard is in place or during the pendency of a deficiency petition. In neither case should the Commission make such fact-based determinations absent a deficiency petition properly before it.

With regard to industry commenters' safe harbor arguments, Law Enforcement finds no statutory support in CALEA for any party to petition the Commission or for the Commission to entertain a petition to make determinations about, or render a legal opinion concerning safe harbor. It should also be noted that the mere existence of a standard does not confer safe harbor; a carrier must actually install or deploy equipment to be in compliance with the standard for safe harbor to be conferred.

*All abbreviations used herein are referenced within the text.

Many trade associations have requested in their comments that the Commission grant a two-year blanket extension of the CALEA compliance date for all telecommunications carriers, from October 25, 1998 until October 24, 2000. Law Enforcement strongly believes that the Commission must reject the requests of these trade associations for a blanket two-year extension for compliance for all telecommunications carriers for numerous reasons. Most importantly, CALEA does not permit such petitions from trade associations, nor does it permit petitions for industry-wide blanket extensions.

As to reasonable achievability, CALEA sections 107 and 109 serve distinctly different purposes under CALEA; each section addresses distinctly different issues. The reasonable achievability criteria of section 109 definitely should not be applied to, or considered in, section 107 extension petitions, nor should the Commission otherwise conflate these distinctly different provisions.

As to the definition of "a telecommunications carrier," Law Enforcement agrees with the Commission's conclusion that section 601(c)(1) of the Telecommunications Act of 1996 did not modify CALEA's definition of "a telecommunications carrier," or its definition of "information services." The Commission should not modify the definition of "a telecommunications carrier" or "information services" for the purposes of interpreting CALEA. Additionally, Law Enforcement agrees with the Commission's proposal not to adopt a specific list of the types of carriers that would be subject to the obligations of CALEA because, over time, new communications technologies will come into existence. However, Law Enforcement believes that the Commission should not incorporate the word "indiscriminately" into the definition of "a telecommunications carrier." Law Enforcement continues to advocate that the term "indiscriminately" may cause an unnecessary ambiguity regarding the reach of the term telecommunications carrier under CALEA.

Law Enforcement continues to recommend that the Commission not exercise its discretion pursuant to section 102(8)(C)(ii) of CALEA, which allows the Commission to exclude

specific classes and categories of carriers from the obligations of CALEA after consultation with the Attorney General. Rather, Law Enforcement maintains that the Commission should clearly state that the following are within the definition of "a telecommunications carrier:" paging systems; resellers, including those with pre-paid calling card and similar services; and commercial mobile service providers.

On the other hand, Law Enforcement agrees with the Commission's conclusion that providers of pay telephones are not telecommunications carriers for purposes of CALEA. CALEA is concerned with the *type* of telecommunications service, not the *manufacturer or owner of the physical phone or device*. Additionally, Law Enforcement agrees with the Commission's tentative conclusion that exclusive providers of information services are excluded from CALEA's requirements and are not required to modify or design their systems to comply with CALEA with regard to information services.

With regard to carrier security policies and procedures, Law Enforcement has a number of serious concerns. It is imperative that the Commission craft systems security and integrity rules, procedures, and policies that satisfy Law Enforcement's investigative and evidentiary needs and that address public safety demands. The Commission should make it clear that a carrier's duty under CALEA to ensure that intercepts are appropriately executed applies to its personnel designations, employee oversight, and personnel practices and procedures.

However, Law Enforcement strenuously asserts that there is absolutely no language in CALEA or its legislative history that suggests that CALEA was intended to alter a carrier's response to a facially-valid court order or other lawful authorization. Nor does Law Enforcement believe that CALEA grants discretion to the Commission to confer such authority on carriers.

Carriers should designate specific employees to assist law enforcement officials in implementing lawful interceptions. What should separate this group of designated personnel from the broad mass of carrier employees is a higher guarantee of trustworthiness, given the

great sensitivity of conducting electronic surveillance. In this manner, safeguards can be built into the system that protect the integrity, security, and evidentiary validity of electronic surveillance information. Further, Law Enforcement's need to have access to assistance from carriers with respect to the implementation or maintenance of electronic surveillance intercepts on a 24-hour per day, seven-day a week basis. Additionally, Law Enforcement strongly urges that the Commission require that no more than two (2) hours be allowed to elapse between the time of the discovery that an intercept has been compromised, or is suspected of being compromised, and the report of that fact to the affected law enforcement agency or agencies.

Law Enforcement strongly contends that any carrier activities that threaten to compromise the security of electronic surveillance activities could endanger lives and impede prosecutions. Each carrier must ensure that the personnel it designates to implement and have access to interceptions perform only authorized interceptions, and that those personnel do not reveal the existence or content of those interceptions to anyone other than law enforcement personnel, except pursuant to valid court, legislative, or administrative order.

In order to minimize the recordkeeping burden on carriers, Law Enforcement suggests that carriers should be required to create records and transmit the originals, or certified copies, of all electronic surveillance records to the cognizant law enforcement agency by no later than five (5) days following the conclusion of an intercept. This way the record retention obligation can be handled properly by Law Enforcement.

With regard to the reporting requirements regarding the implementation of an electronic surveillance, Law Enforcement believes that a less stringent means than an affidavit would suffice. The execution of a single "certification" for each surveillance by the supervisory carrier official would suffice in place of more formal affidavits executed by all of the carrier personnel involved and would reduce a carrier's paperwork burden.

Law Enforcement also agrees that all carriers, regardless of their size, need only certify

initially that they are in compliance with the security policies and procedures mandated by CALEA and its implementing regulations, and then re-certify to such compliance every two (2) years thereafter. Requiring such certification will substantially decrease reporting burdens placed on carriers. Finally, in order to ensure consistency in standard security policies and procedures, Law Enforcement advocates that the Commission develop standardized forms to assist carriers in designing CALEA compliance manuals. This would ensure that common standards would be applicable to large and small carriers alike.

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of:)
)
Communications Assistance for Law) CC Docket No. 97-213
Enforcement Act)
)
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**Reply Comments of the FBI Regarding
Implementation of the Communications
Assistance for Law Enforcement Act (CALEA)**

I. INTRODUCTION

1. The Federal Bureau of Investigation (FBI) respectfully submits its reply comments in the above-referenced proceeding on its own behalf and on behalf of other Federal, state, and local law enforcement agencies (hereinafter referred to collectively as "Law Enforcement").¹

¹ Following the enactment of CALEA, the FBI assembled the Law Enforcement Technical Forum ("LETf"), which consists of representatives from 21 Federal and 30 state and local law enforcement agencies, as well as the Royal Canadian Mounted Police. LETf members have participated in the development of the positions submitted with these reply comments. In turn, the FBI and the LETf have coordinated CALEA implementation issues, and developed consensus positions, with several hundred of the major law enforcement agencies and prosecutors' offices across the United States.

II. CALEA'S TECHNICAL STANDARD AND SAFE HARBOR PROVISIONS²

2. The Telecommunications Industry Association ("TIA") has recommended that the Commission refrain from establishing, by rule, under section 107(b), technical requirements or a standard to meet the requirements of section 103 of CALEA, in light of the recently promulgated TIA interim standard J-STD-025.³ Although Law Enforcement strongly maintains that the TIA interim standard is deficient because it lacks certain key capabilities, Law Enforcement has not yet petitioned the Commission to establish a new standard to meet the requirements of section 103. Hence, we concur with TIA that, at this time, the Commission's undertaking of a rulemaking action regarding a CALEA standard in *this* NPRM would be unwarranted.⁴ Indeed, we believe that it would not be legally supportable under CALEA.⁵ Under section 107(b), the proper procedure, now that the J-STD-025 interim standard has been issued, is for a government agency or a person to file a petition with the Commission which claims that the standard, as promulgated, is deficient. To date, no party has petitioned the Commission regarding this interim standard.⁶ Absent the

² Law Enforcement has followed the structure of the comments filed by industry for the Commission's ease of review. It should be noted, however, that the issues upon which industry focuses the most attention — the technical standard, extensions, and safe harbor provisions — are not the subject of this proceeding.

³ See TIA Comments.

⁴ *Id.*

⁵ See 47 U.S.C. 1006(b) and the Commission's CALEA analysis in its NPRM at 28. *Accord*, TIA.

⁶ Several commenters have encouraged the Commission to rule on Cellular Telecommunications Industry Association's (CTIA) pre-J-STD-025 petition, which had requested the Commission to adopt and establish, as a CALEA technical standard, the then working (but unfinalized) TIA SP-3580 document. CTIA asserted in its petition that no standard existed, and went on to inaccurately allege that the FBI would effectively block the promulgation of a final standard. It thus argued that the Commission should jump into the breach and act. CTIA's central arguments in that petition, of course, have been proven

requisite statutory predicate of a deficiency petition being filed regarding J-STD-025, the Commission lacks the statutory authority to engage in such rulemaking.

3. TIA also has requested the Commission to clarify the safe harbor provisions found in section 107(a) of CALEA with reference to the J-STD-025 interim standard.⁷ Law Enforcement strenuously objects to this request. Law Enforcement finds no statutory support in CALEA for any party to so petition the Commission or for the Commission to entertain a petition to make determinations about, or render a legal opinion concerning, safe harbor. The statutory authority conferred upon the Commission under section 107(b) of CALEA is specific and limited.⁸ It extends to establishing, if petitioned to do so, technical requirements or a standard, if none exists, and technical requirements or a standard where those in existence are claimed to be, and are determined by the Commission to be, deficient. Under such circumstances, the Commission may provide a reasonable period of time and conditions for compliance. During the period of transition, the Commission may also set forth new technical requirements for carriers or craft a new standard that would fully meet the requirements of section 103. Although Congress presumably could have empowered the Commission to make determinations about, and confer, safe harbor, the absence of any such language in CALEA clearly indicates that Congress did not intend to grant such authority

wrong — TIA has issued the J-STD-025 standard. Moreover, the FBI obviously did not *prevent* (and never could have *prevented*) the promulgation of an industry standard. Therefore, under the express and limited conditions specified under CALEA, which allow for the submission of a standards-related petition to the Commission, CTIA's pre-standard petition fails to comply with CALEA and lacks validity. It is clear then that, as a matter of law, absent the requisite statutory compliance, the Commission cannot act upon CTIA's petition.

⁷ See TIA Comments.

⁸ TIA concurs: Congress provided the Commission with only a limited role in establishing technical compliance standards. TIA Comments at 6.

to the Commission.

4. Further, the Commission should also reject TIA's request to render advisory opinions in *this* NPRM regarding carrier and manufacturer liability during the period that the interim standard is in place or during the pendency of a deficiency petition. Similarly, the Commission should refuse to address in *this* NPRM how much time it would allow for compliance if a new standard were established.⁹ Obviously, the Commission cannot make such determinations absent a deficiency petition properly before it. Moreover, it would be premature and improper to address these fact-based issues absent a fully-developed record. Resolution of these issues would necessarily be tied directly to determinations of case-specific factual circumstances associated with the nature of, and the reasons for, the deficient standard, and how long it would take the various manufacturers, carriers, or others to redress the deficiencies identified. Therefore, Law Enforcement strongly urges the Commission to decline to address these issues before they are properly presented to the Commission.

5. The Commission already has wisely decided that it will address any petition regarding a CALEA standard and requests for extensions of time for compliance separately in another rulemaking.¹⁰ Law Enforcement supports the Commission's stated position and urges the Commission not to reverse itself in that prudent decision.

6. Finally, Law Enforcement would be remiss if it failed to note some imprecise assertions made by United States Telephone Association (USTA) and CTIA suggesting that the *mere existence* of the published J-STD-025 interim standard satisfies the safe harbor

⁹ See TIA Comments.

¹⁰ Commission NPRM at 30.

requirements of section 107(a).¹¹ In fact, as the Commission has previously noted in its NPRM, safe harbor under section 107(a) can only potentially exist where the carrier or manufacturer is *in compliance with* publicly available technical requirements or standards adopted by an industry association or standard-setting organization, or by the Commission under section 107(b) that meet the requirements of section 103.¹² Since carriers and trade associations assert in their NPRM comments that the technical solutions (software, equipment, etc.) to meet the section 103 requirements are yet to be completed and deployed, it is clear that the statutory requirements for safe harbor have not been met. Current carrier equipment, facilities, and services simply are not in compliance with the interim standard.

III. EXTENSIONS FOR CALEA COMPLIANCE

7. TIA, USTA, and Personal Communications Industry Association (PCIA) have requested the Commission to grant a two-year blanket extension of the CALEA compliance date for all telecommunications carriers, from October 25, 1998 till October 24, 2000.¹³ Law Enforcement strongly believes that the Commission must reject the requests of these trade associations for a blanket two-year extension for compliance for all telecommunications carriers for the numerous reasons set forth below. Most importantly, CALEA does not

¹¹ USTA Comments at Summary 2, and at 10, respectively: ("The Commission should be aware that the industry standards setting body has adopted an interim standard which provides a 'safe harbor' for carriers pursuant to section 107") ("The TIA and Committee T1 subsequently jointly published the standard on an interim/trial use basis. This satisfies the 'safe harbor' provisions of section 107..."). CTIA Comments at TAB B (CTIA letter to TIA, dated Nov. 20, 1997) ("The TR45.2 Subcommittee decided long ago that it would seek ANSI approval for then PN-3580 to meet the section 107 'safe harbor' provisions of ...[CALEA], which requires that technical standards be publicly available and adopted by an industry association or standard-setting organization").

¹² Commission analysis of CALEA in its NPRM at 27.

¹³ *Accord*, CTIA.

permit such petitions from trade associations,¹⁴ nor does it permit petitions for industry-wide blanket extensions.

8. First, recognizing that technological impediments to electronic surveillance capabilities pose an extremely serious risk to the public safety, effective law enforcement, and the Nation's security, Congress intended to keep the window of societal vulnerability as small as reasonably possible. Noting that Law Enforcement, carriers, manufacturers, and others had been engaged in extensive, ongoing technical discussions regarding Law Enforcement's technological interception requirements for several years before CALEA was enacted,¹⁵ Congress concluded, and all parties to the legislation agreed, that the four-year CALEA compliance period within which to meet the section 103 capability requirements was reasonable.

9. Second, although Congress encouraged the use of standards-setting organizations

¹⁴ The Commission has already correctly noted in its NPRM at 33-34 that, under CALEA, it is "a telecommunications carrier" who is authorized to petition the Commission for an extension under section 107(c) ("We propose to permit carriers to petition the Commission for an extension of time ... to determine whether it is reasonably achievable for the petitioning carrier with respect to any equipment, facility, or service ... to comply with the assistance capability requirements of section 103 within the compliance time period") (emphasis added). Congress expressly limited who could petition for an extension under section 107(c) to a "telecommunications carrier." In contrast, section 109(b) provides that "a telecommunications carrier or any other interested person" may petition the Commission regarding a determination of reasonable achievability under section 109.

¹⁵ See H.R. Rep. No. 827, 103rd Cong., 2d Sess., 15, *reprinted in* 1994 U.S.C.C.A.N. 3495 (1994). The FBI and telecommunications industry efforts, described in the House Report, under the Electronic Communications Service Provider Committee (ECSPC), began in May, 1992 with frequent meetings occurring from 1992 through 1994. After CALEA was enacted these meetings intensified and were later subsumed into the TIA standards forum. With law enforcement interception requirements being broadly understood very early on, based upon prior ECSPC "Action Teams" efforts and otherwise, there was little reason to believe that a CALEA industry standard would justifiably take over two-and-one-half years to complete.

as a means of ensuring efficient and cost-effective implementation of the section 103 requirements, Congress made it clear, in section 107(a)(3), that "[t]he absence of technical requirements or standards for implementing the assistance capability requirements of section 103 shall not . . . relieve a carrier, [or] manufacturer . . . of the obligations imposed by section 103."¹⁶ Stated differently, Congress envisioned the use of, and compliance with, an industry standard as but *one of the means* to the *end* of complying with section 103 within the compliance period. If anything, Congress could have assumed that the standards-setting process *means* would have hastened -- not delayed -- CALEA compliance. The standards-setting process -- a process dominated and controlled by the telecommunications industry -- was never intended to operate as an end in itself. Nor would industry delay in promulgating a standard, in and of itself, justify an extension. Congress never intended one of the industry's means of implementing CALEA to effectively operate as a trump card in the industry's hands to repeal *de facto* CALEA's compliance date at the industry's discretion.

10. Indeed, Congress was prescient in its awareness that, absent statutory language affirmatively directing carrier compliance within four years, an industry-dominated standards process could easily drag out technical discussions and solutions development indefinitely -- a prospect in conflict with Congressional intent. Moreover, Congress anticipated that an industry-based standard might be challenged as deficient and provided a statutory mechanism to deal with such challenges.

11. Third, the delay in promulgating an industry standard has arisen essentially because the industry has refused to include all of the technical functionality, consistent with the section 103 assistance capability requirements, that Law Enforcement has consistently stated it requires to effectively, properly, and lawfully conduct electronic surveillance. Law Enforcement has repeatedly advised TIA's standards-setting body *what* interception

¹⁶ See the Commission's concurring CALEA analysis in its NPRM at 28.

capabilities Law Enforcement requires, based upon its vast operational and courtroom experience, to properly conduct electronic surveillance in a way that meets evidentiary, security, and integrity needs.

12. In CALEA, Congress recognized that law enforcement officers are the experts in, and end-user recipients of, the electronic surveillance solutions being developed. The industry has wrongfully excluded these necessary end-user law enforcement interception capability requirements from the interim standard.¹⁷ Although carriers, manufacturers, and others, under CALEA, are certainly equipped and entitled to make determinations about *how* best to implement Law Enforcement's requirements technologically, CALEA does not empower the industry to veto in the standard those section 103 capability requirements that Law Enforcement has consistently stated it needs to do its job properly and lawfully.¹⁸

13. Fourth, trade association requests for a blanket extension of time for compliance are grounded in the flawed rationale that, since the J-STD-025 interim standard has only recently come into existence, it would be impossible for equipment to exist that would meet the section 103 assistance capability requirements or the J-STD-025 interim standard by the

¹⁷ The House Report on CALEA states that telecommunications carriers "will have a 'safe harbor' and be considered in compliance with the capability requirements if they comply with publicly available technical requirements or standards designed in good faith to implement the assistance requirements." H.R. Rep. No. 827, 103rd Cong., 2d Sess., 26, *reprinted in* 1994 U.S.C.C.A.N. 3506 (emphasis added).

¹⁸ The House Report on CALEA indicates the nature of the industry's proper role in implementing CALEA within standards forums. "The legislation provides that the telecommunications industry itself shall decide *how* to implement law enforcement's requirements ." (emphasis added), H.R. Rep. No. 827, 103rd Cong., 2d Sess., 19, *reprinted in* 1994 U.S.C.C.A.N. 3499 (1994). The point is: the requirements are law enforcement's, and *how they are to be implemented* is for the telecommunications industry to decide. But, the industry cannot decide not to implement important portions of Law Enforcement's interception requirements.

October 25, 1998 compliance date.¹⁹ Further, these requests misleadingly represent, based on normal industry practice, that it will take manufacturers 24-30 months from the promulgation of the J-STD-025 interim standard to produce CALEA compliant solutions.²⁰

14. Based upon direct discussions with manufacturers, Law Enforcement has learned that most manufacturers have been developing technological solutions for some time to address the section 103 requirements. Further, while there are several important technical interception capabilities that have not been incorporated into the J-STD-025 interim standard, Law Enforcement and the industry have been in full agreement for quite some time with regard to the inclusion of all of the other technological capabilities set forth in the interim standard. As to these agreed-to items, which constitute the great majority of the overall requirements, most manufacturers long ago began designing and developing solutions even to some interception capabilities excluded from the standard. In fact, several manufacturers are well along the way. Moreover, a number of the manufacturers have developed many of the needed CALEA solutions in their switching platforms in order to meet CALEA-like solutions required of them by statute or otherwise by law enforcement or national security entities in a number of foreign countries.

15. Based on progress that the industry has already reported making, it is likely that certain manufacturers will have developed technological solutions to meet most (if not all) of the section 103 requirements by October 25, 1998, or shortly thereafter.²¹ Thus, a blanket

¹⁹ See, e.g., CTIA Comments at 8: "The absence of a standard a fortiori means that compliance is not 'reasonably achievable through application of technology available within the compliance period.'"

²⁰ See, e.g., TIA's Comments.

²¹ See the attached FBI report filed with U.S. House of Representatives Appropriations Committee Chairman Rogers, dated Jan. 26, 1998, (Appendix A). In this report, it is stated that a Bell Emergis network-based CALEA solution will be available to carriers before the

two-year extension for compliance would be unjustified, particularly given the serious risk to the public safety, effective law enforcement, and the Nation's security posed by ongoing technological impediments to electronic surveillance.

16. Fifth, under section 107(c)(2), "Grounds for Extension," the statutory language of CALEA states that a request for an extension of the compliance date must be based upon a determination that compliance with the assistance capability requirements under section 103 is not reasonably achievable through application of technology available within the compliance period. The language of the statute indicates that such an extension should be grounded on the *technological feasibility* of meeting these requirements within the compliance period. CALEA, section 107(c)(2), does not envision industry delay in promulgating a standard as proper "grounds" for the Commission's granting extensions.²²

17. There is little doubt that had the industry proceeded expeditiously to design and develop technical solutions that would meet Law Enforcement's articulated interception requirements under section 103 -- either within the industry-controlled J-STD-025 interim standard or otherwise -- that section 103-compliant technology would widely exist and have been implemented within the compliance period. In the context of CALEA's treatment of enforcement orders against carriers for failing to meet the requirements of section 103, Congress specified that such orders may be issued by courts if compliance is "reasonably achievable through the application of available technology ... *or would have been reasonably*

October 25, 1998 compliance date, and that the commonly-used Nortel DMS-100 switches will be substantially CALEA-compliant by the 4th quarter of 1998.

²² As noted above, it appears certain technological solutions will be available by October 25, 1998 to meet the section 103 requirements. Therefore, it cannot seriously be maintained, under section 107(c)(2), that compliance is "not reasonably achievable through application of technology available within the compliance period."

achievable if timely action had been taken" (emphasis added).²³ Moreover, in assessing enforcement actions for CALEA noncompliance and the time to be granted for achieving compliance, Congress specified, among the factors to be weighed, good faith efforts to comply in a timely manner and the culpability or delay in undertaking efforts to comply.²⁴ Law Enforcement strongly believes that the Commission should not reward the industry for its delay in the standards-setting process where such delay is responsible for the unavailability of certain technological solutions within the compliance period.²⁵ This is particularly so, since technological complexity has not been asserted as the grounds for not achieving timely CALEA compliance.

²³ 47 U.S.C. 1007(a)(2).

²⁴ 47 U.S.C. 1007(b).

²⁵ Some commenters (e.g., USTA, SBC) have suggested that the absence of a final capacity notice precludes manufacturers and carriers meeting the CALEA compliance date, and that this provides a basis for granting a blanket two-year extension for compliance (e.g., USTA at 14; SBC at 24). Such assertions are misleading on a number of counts. The argument that switch manufacturers cannot proceed to implement the CALEA capability requirements without a set of *finalized* capacity numbers is erroneous. First, the Second Notice of Capacity, which sets forth detailed capacity numbers throughout the United States for every wireline carrier (county) and wireless carrier (service area) was issued on Jan. 14, 1997. Law Enforcement has assured the industry that these capacity numbers would not change in the Final Notice of Capacity. These hard, location-specific capacity numbers have undoubtedly enabled manufacturers to use them as guidance in the design and development process. Second, although there are some aspects of a manufacturer's solution that are capacity-dependent, the majority of the section 103 capability requirements are not. Thus, manufacturers could have progressed substantially without the Final Capacity Notice being issued, as long as a range of capacity numbers was known. More specifically, a manufacturer could proceed in developing methodologies to access call content and call-identifying information without regard to the capacity. Also, a manufacturer could proceed in identifying delivery protocols without regard to the capacity.

Importantly, Congress properly understood that capability and capacity have only a limited interrelationship. Accordingly, it specified in CALEA that the capability requirements were to be met by October 25, 1998, whereas the capacity requirements were to be met within three years of the final capacity notice.

18. Sixth, section 107(c) expressly provides that only a telecommunications carrier may petition the Commission for an extension. Thus, there is no statutory authority for trade associations or others, outside of telecommunications carriers, to petition the Commission for an extension of the compliance date. Correspondingly, there is no statutory authority for the Commission to entertain petitions filed by entities having no statutory standing to petition the Commission under section 107(c). This is because this CALEA section was intended to exclusively address carrier-specific factors that, if warranted, may support an individual carrier's extension request.

19. Seventh, Law Enforcement believes that CALEA does not permit blanket extensions of time to comply with CALEA. Congress recognized that each carrier's compliance issues, solution(s), and developmental efforts for modifying its equipment, facilities, and services (either independently or in conjunction with its switch manufacturer(s) and support service provider(s)) would vary. Congress, in section 107(c), sought to ensure case-specific equity and fairness for an *individual* carrier and Law Enforcement. Given the severe threats to effective law enforcement, public safety, and the Nation's security, section 107(c)(2) mandates that the Commission consult with the Attorney General in order to assess whether a particular telecommunications carrier's request for an extension is warranted given *its* particular equipment, facilities, or service. As noted above, Congress intended to keep the window of societal vulnerability as small as reasonably possible.

20. Because Congress intended these assessments to be made *on a case by case basis*, it enacted language specifically stating that it must be a telecommunications carrier which may petition the Commission for any justifiable extension of time to comply with section 103. Indeed, under section 107(c)(4), any extension granted must be specific and tailored in its application and shall apply to only that part of the carrier's business on which

the new equipment, facility, or service is used.²⁶

21. Congress prudently recognized that the factual basis for a particular carrier's petition must be tied directly to the particular circumstances of the petitioning carrier and to specific components of that carrier's network in question.²⁷ Given the serious impact upon the public safety, effective law enforcement, and the Nation's security, the Commission should decline to rewrite CALEA in a fashion inconsistent with the language used, and the intent evidenced, by Congress as it narrowly tailored the provisions regarding who could seek extensions, their breadth, and the grounds for them under law.

22. Finally, the Commission should consider the fact that the FBI and the Department of Justice recently have extended an offer to the leading manufacturers (and derivatively to their client carriers) to enter into agreements under which the Department of Justice would not pursue enforcement actions against the manufacturer or its carriers where compliance within the compliance date was in doubt because the particular manufacturer had not made available a technological solution fully compliant with CALEA section 103

²⁶ Several telecommunications carriers (e.g., Bell South, Bell Atlantic) have encouraged the Commission to act upon CTIA's July 1997 petition to the Commission as it relates to granting an industry-wide two-year extension for compliance. Bell South Comments at 16; Bell Atlantic Comments at 8-9. However, as discussed *supra*, Law Enforcement believes that CTIA's petition lacks vitality since an interim standard has been published which supersedes CTIA's petition to establish a technical standard. Moreover, the Commission would not be empowered to grant such a "blanket" extension for all carriers, even if brought by carriers, since a proper telecommunications carrier petition must be specific and exclusive as to that carrier's own equipment, facilities, or service, as required under section 107. And, we do not believe that Bell South's, Bell Atlantic's or any other carrier's Comments were intended to be, or could properly be construed as constituting, a section 107 extension petition as to *their* particular equipment, facilities, or service.

²⁷ See H.R. Rep. No.827, 103rd Cong., 2d Sess., 18-19, *reprinted in* 1994 U.S.C.C.A.N. 3498-99, ("[The legislation] allows any company to seek from the FCC up to a two-year extension of the compliance date if retrofitting a *particular system* will take longer than the four years allowed for compliance" (emphasis added)).

requirements. Such agreements would cover specific switching platforms (or other non-switch solutions) and would include reasonable deployment schedules and verifiable milestones.

23. The Department of Justice also indicated, in this initiative, that it would support a carrier's petition to the Commission for an extension of the compliance date for the specific equipment named in the agreement and for the length of time specified in the agreement. Law Enforcement strongly believes that extensions, such as noted here, that are tailored to specific carriers, specific equipment, and specific deployment schedules are consistent with the carrier- and case-specific treatment Congress required under section 107(c).²⁸ Proceeding with this Department of Justice initiative will obviate wholesale industry-wide extension petitions to the Commission. Where petitions are filed, they can be decided expeditiously because the Department will have endorsed them.²⁹

IV. REASONABLE ACHIEVABILITY UNDER SECTION 109 AND ITS INAPPLICABILITY UNDER SECTION 107

24. Law Enforcement previously responded to the Commission's request for comments as to whether the section 109 "reasonable achievability" criteria could be applied appropriately to a carrier petition for an "extension" under section 107.³⁰ In our Comments,

²⁸ Moreover, the Department of Justice's approach outlined here should be extremely effective in addressing and resolving the concerns of a substantial number of carriers and manufacturers with regard to specific equipment, facilities, and services, and it clearly does not constitute a legally impermissible and highly objectionable industry-wide "blanket" extension.

²⁹ Department of Justice initiative is set forth in a letter addressed to the Telecommunications Industry Association. See Letter of January 22, 1998 from Attorney General Janet Reno to Matthew Flanagan, President, TIA, attached hereto as Appendix B.

³⁰ The Commission's NPRM at 33-34.

we noted that sections 107 and 109 serve distinctly different purposes under CALEA, and that each addresses distinctly different issues.³¹ Upon further consideration, and after reviewing the comments of AT&T³² and others, Law Enforcement has now concluded that the reasonable achievability criteria of section 109 definitely should not be applied to, or considered in, section 107 extension petitions, nor should the Commission otherwise conflate these distinctly different provisions.

25. As Law Enforcement noted in its prior Comments, section 107 essentially relates to the timing of compliance: that is, whether meeting the assistance capability requirements by October 25, 1998 is "reasonably achievable through application of technology available within the compliance period (emphasis added)."³³ By contrast, determinations of reasonable achievability under section 109 pertain to the broader aspects of technical and cost feasibility: that is, "whether compliance would impose significant difficulty or expense on the carrier or the users of the carrier's systems,"³⁴ and *presupposes that technological solutions are available to a carrier*. A careful reading of section 109 reveals that Congress envisioned that a section 109 petition would follow, only if required, a section 107 carrier petition for an extension.

26. As can be seen from the AT&T comments and otherwise,³⁵ if section 109 criteria and factors are applied to section 107 extension requests, confusion will needlessly abound,

³¹ FBI Comments at 41-42.

³² See AT&T Comments generally at 21-27.

³³ 47 U.S.C. 1006(c)(2).

³⁴ 47 U.S.C. 1008(b)(1).

³⁵ AT&T argues that "carriers should be able to petition for a section 109(b) determination in conjunction with a section 107(c) determination." *Id.* at 27.

and Congress' original intent will be significantly distorted. For example, AT&T notes that section 109 allows up to one year for the Commission to make a determination about a reasonable achievability petition under section 109. While this is true, AT&T then links the time period for a section 109 reasonable achievability determination with its assertion that "[t]he industry is less than one year away from the CALEA compliance deadline and hardware or software to implement the industry standard is not available yet." (Emphasis added.)³⁶

27. Aside from the irrelevance of an industry standard to meeting CALEA's compliance date, AT&T appears to be using the threat or prospect of multiple section 109 reasonable achievability petitions as a lever to force the Commission into "toll[ing] the compliance deadline automatically,"³⁷ which would in effect create a *de facto automatic* extension, prohibited by CALEA, by suggesting that failing to do so would cause "gaps" and "carrier doubts."³⁸ In addition, if, as suggested by AT&T, carriers could seek to evade compliance altogether under the section 109 reasonable achievability regime (and its mechanism for *deeming equipment to be compliant* under certain circumstances), when the only genuine issue may be whether compliant equipment is available by October 25, 1998 or shortly thereafter, it could only result in further distortion of Congressional intent.³⁹

³⁶ *Id.* at 21.

³⁷ *Id.* at 22.

³⁸ *Id.*

³⁹ *Id.* at 23. In addition, several commenters, including AT&T, misstate the meaning of the term "installed or deployed" as used in section 109 of CALEA. *See, e.g.,* AT&T Comments at 20. The CALEA Cost Recovery Rules, 28 C.F.R. part 100, define "installed or deployed" as follows: "'Installed or deployed' means that, on a specific switching system, equipment, facilities, or services are operable and available for use by the carrier's customers." (28 C.F.R. 100.10). When the FBI proposed this definition in the May 10, 1996 Cost Recovery NPRM (61 FR 21396), no commenters raised concerns about this definition of "installed or deployed." However, when the FBI published its Advance Notice of Proposed Rulemaking

28. Law Enforcement believes that it is critical to look to Congressional intent, as embodied in these provisions. Had Congress intended to permit the criteria and "factors" specified in section 109 to be applied to section 107 extension petitions, it could have easily done so, but it did not. Similarly, it is clear that Congress did not intend for these very different provisions to be merged and intermingled. Instead, as noted above, Congress strictly limited evaluations of petitions for extensions under section 107 to the *availability* of technical solutions *within the compliance period*. Moreover, Congress made clear that only a carrier could petition for an "extension" under section 107. Under section 109, however, a carrier or other interested party can petition the Commission, based upon factors delineated in section 109(b)(1), which are unrelated to the timing of compliance. The Commission should defer to the CALEA-regime as Congress created it; the Commission should resist being persuaded into rewriting it.

requesting *only* proposed definitions of the term "significant upgrade or major modification" (61 FR 58799), some commenters took that as an opportunity to argue that "deployed" should mean "commercially available prior to January 1, 1995" and should, therefore, be defined separately from the term "installed." The commenters in this proceeding before the Commission seek to make the same false distinction. The FBI believes that this belated attempt to interject a "commercially available" definition, as argued by these commenters in this NPRM, is both procedurally improper and substantively inconsistent with CALEA. In CALEA section 109(e)(3), the Submission of Claims provision, reads: "Such [Cost Control] regulations shall require any telecommunications carrier that the Attorney General has agreed to pay for modifications pursuant to [section 109] *and that has installed or deployed such modification* to submit to the Attorney General a claim for payment" (emphasis added). It is unlikely that Congress intended that carriers would be able to submit claims for payment simply because a piece of equipment was commercially available. It is also unlikely that Congress intended that the Attorney General agree to reimburse carriers for commercially available equipment sitting in their warehouses. Rather, it seems clear that Congress intended that claims be submitted only for such equipment for which the CALEA solution was "operable and available for use" or "deployed."